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EP

No. 67342-4-1

IN THE COURT OF APPEALS DIVISION I  
STATE OF WASHINGTON

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STATE OF WASHINGTON  
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CHARLES ROBERT GARNER

Appellant,

v.

HOFFMAN CONSTRUCTION, INC., ET AL.

Defendants.

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APPELLANT'S OPENING BRIEF

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CHARLES ROBERT GARNER  
PRO SE  
29811 MARINE VIEW DR. SW  
FEDERAL WAY, WA. 98023-3422  
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CHARLES R. GARNER

Appellant Brief

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United States of America v. Wolfgang "Tito" Roempke, No. CR10-62JCC

United States District Court Western District of Washington at Seattle

(2010)

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1. Introduction

It has been determined that similar actions to this case have been deemed as felonious by the District Court in Seattle, Washington.

United States of America v. Wolfgang "Tito" Roempke, No. CR10-62JCC

United States District Court Western District of Washington at Seattle

(2010)

It is imperative that to Protect the Health, Safety, and Welfare of the people, Contractors should comply with the established rules and not try to work around them.

("[A] court should presume that [a] statute says what it means.").

Aslanidis v. United State.s Lines, Inc, 7 F.3d 1067, 1072 (2d Cir. 1993)

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"If the words of the statute are unambiguous, judicial inquiry should end, and the law interpreted according to the plain meaning of its words."

Rubin v. United States, 449 U.S. 424, 430, 101 S.Ct 698, 701 (1981)

"[A] court will not adopt a different construction absent clear legislative history contradicting the plain meaning of the words." United States v.

Holroyd, 732 F.2d 1122, 1125 (2d Cir. 1984).a

Appellant Garner was not involved in any way with the actions of the City of Federal Way, (hereinafter "City"), in its initiation of the demolition; the ordering of an asbestos survey from NOW Environmental Services, Inc., (hereinafter "NOW"); the Notification required by the Puget Sound Clean Air Agency, (hereinafter "PSCAA") of such demolition; the Request for Quotes; the formation and signing of the Contract between Hoffman Construction, Inc., (hereinafter "Hoffman"), and the City; and the actions of Hoffman in carrying out that Contract.

Appellant Garner, (hereinafter "Garner"), filed this lawsuit against Hoffman, et al, for the physical and chemical destruction of Garner's property, not the structure itself; and to claim rights asserted in the

Constitution of United States Amendment XIV. § 1. ; and to assert the Constitution of Washington, Declaration of Rights Article 1, § 3. Personal Rights provisions.

There can be no question of the fact that Hoffman was responsible for its actions. The Contract with the City at: " 1.5 Compliance with Laws. Contractor shall perform the Work in accordance with all applicable federal, state, and City laws, including but not limited to all City ordinances, resolutions, standard or policies, as now existing or hereafter adopted or amended, and obtain all necessary permits and pay all permits, inspections, or other fees, at its sole cost and expense." (Note "...other fees, at its sole cost and expense".)

Hoffman knew, or should have known, that there was a concern over asbestos from the Request for Quotes and from the invalid accreditation of the Inspector provided to Hoffman. The Contract was signed in the City Municipal Building which has/ or should have, all supporting documentation, Federal, State, and City, associated with asbestos. The City mapping section has the Lakehaven Utility District Wellhead and Critical Aquifer Recharge areas depicted, as well as a whole section of the FWRC dealing with it. The City's Notification to the PSCAA was received

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and logged in on 11/18/2009, so it would have been in the City's file for review. The asbestos survey was completed on Dec. 1, 2009, so it would have been in the file for review. The Contract was signed on Dec. 11, 2009. The Commercial general liability and automobile liability, combined, of \$4,000,000 didn't seem to strike an alarm either. Without taking any precautions, and without due diligence, Hoffman began the demolition.

The Complaint was filed indicating that Hoffman introduced toxic substances into the air and on to the ground. The only one that was remotely considered by the City and Hoffman was asbestos. Completely ignored were lead based paint, arsenic, cadmium, and mold. All of which are on the WAC 246-290-72012 Regulated Contaminates list.

## II. Assignments of Error

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Appellant Brief

## ASSIGNMENTS OF ERROR

No. 1 The Trial Court erred in failing under CR 19 (a) (B) to order the joining of Persons needed for a just adjudication. The City of Federal Way after being Noticed by Hoffman ; Lakehaven Utility District; and Mr. John Ahlers of Ahlers & Cressman (prior counsel of Hoffman .) served notice of the Third Party status of the City.

No. 2 The Trial Court erred in failing to comply with CR 7 (b) (2)

No. 3 The Trial Court erred in failing to comply with CR 10 (a) (1) (2)

No. 4 The Trial Court erred in the application of CR 11 as to facts and as to the amount and distribution of attorneys' fees and costs.

No. 5 The Trial Court failed to join the City of Federal Way as a Third Party Defendant to comply with CR 14 (a)

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No. 6 The Trial Court erred in the application of RCW 4.84.185 as to the factual amount and as to payee.

No. 7 The Trial Court erred in not joining on its own initiative the City of Federal Way under CR 21 as was warranted and just, and further failed to join other necessary parties.

No. 8 The Trial Court erred in the application of CR 56 Summary Judgment.

No. 9 The Trial Court erred in failing to recognize that from the evidence presented the property was damaged by Hoffman in violation of the Constitution of United States, Amendment XIV, § 1. and/or the Constitution of Washington, Declaration of Rights, Article 1, § 3.

## Issues Pertaining to Assignment of Error

The Case was Charles Robert Garner v. Hoffman Construction, Inc. et al. Which indicated to all parties that there were others to be joined. The Case Schedule by the Court set a Deadline for Joinder. Early on Hoffman substituted attorney of record and both attorneys noted it to the Court, with a changed caption block to "and The City of Federal Way, Defendants." The Notice was sent to Peter B. Beckwith, Assistant City Attorney for the City of Federal Way. A subsequent Declaration by the new Counsel provided a Declaration from Stan French, from Lakehaven Utility District, with the same caption block. Mr. French supplied an amendment to the first Declaration and retained the City of Federal Way in the caption as defendants. The second Declaration also came through Hoffman counsel with the firm block. Hoffman counsel dropped the et al, suffix and thereafter used Hoffman Construction, Inc., Defendant. Did the attorneys and Lakehaven Utility District, given the above information, have the authority to use "vouching-in" or other means of adding the City of Federal Way as a Third Party and if so why wasn't it done? (Assignment of Error 1.)

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Does the Court allow attorneys to switch, at will, the caption block of the Defendant(s) in the Case in violation of CR 7 (b) (2)? (Assignment of Error 2)

Does the Court Clerk allow violation of CR 10 (a) (1) (2)? (Assignment of Error 3)

Hoffman in the original written Motion for Summary Judgment and for Award of Terms Under RCW 4.84.185 and Rule 11, was for sanctions for attorneys' fees and costs simultaneously. That Motion was replaced with, Motion For Summary Judgment and For Terms, which was replaced with Motion for Summary Judgment and For Fees and Costs.

The amount so requested is inconsistent with the Declaration of Karen Hoffman, Vice President of Hoffman Construction, Inc. The contract between Hoffman and the City provides that the City will pay all attorney fees and costs. Does the Court have authority to invalidate that contract and award Hoffman what it erroneously claims as owed? (Assignment of Error 4)

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The Trial Court having been notified by both Hoffman Counsels and by Lakehaven Utility District that the City of Federal Way was subject to the Court, giving rise to a Third Party interest and claims as contemplated in CR 14 (a). Does the Court have authority to sanction an equitable estoppel and not join the Persons? (Assignment of Error 5)

There is a question as to the applicability of the Trial Court awarding Hoffman under RCW 4.84.185 attorneys' fees and costs simultaneous with the Summary Judgment without further Motion as described in the text of the RCW. The original Motion was then redacted by Hoffman to eliminate RCW 4.84.185 to state: Motion for Summary Judgment and for Terms. "Terms" is not consistent with the Contractual provisions by which Hoffman is indemnified by the City of Federal Way for " including costs and attorney fees". The Order signed by the Trial Court reflects a change to eliminate that error, by reading, "Order on Defendant's Motion for Summary Judgment and For Fees & Costs. The contract also indemnifies Garner by the same contract and language. Does the Court have the authority to enforce that language? (Assignment of Error 6)

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Appellant Brief

The Trial Court had within its power under CR 21, the authority to join all the third parties necessary for a fair and just ruling. Did the Trial Court have the authority to deprive Garner of the opportunity to file a Joinder of Parties as provided in the Superior Court Case Schedule? (Assignment of Error 7)

Using the established criteria for Summary Judgment, and ruling in the most favorable light of the non-moving party, did the Trial Courts Order meet those criteria? (Assignment of Error 8 )

The Trial Court erred in violating the plaintiff's rights under the Constitution of the United States , Amendment XIV, § 1. and the Constitution of Washington Art. 1 § 3.1 (Assignment of Error 9)

### III. STATEMENT OF THE CASE

This Appeal is from a Summary Judgment Order from the Superior Court originating as Charles Robert Garner v Hoffman Construction, Inc., Et Al. The Trial Court Order was awarded to Hoffman Construction, Inc.

The City of Federal Way, WA., by order of its Appeal Commissioner, set out to demolish a structure it had adjudged as "Unfit". The structure's

content; location; and the numerous governmental agency controls required strict compliance for the Health, Safety and Welfare of the general populace as dictated by the United States Government.

The City of Federal Way contracted with NOW Environmental Services, Inc. to perform a required Asbestos Survey on the structure. The City had already provided the Puget Sound Clean Air Agency a required building demolition notification. (CP 14) The City then published a Request For Quotes from Contractors to demolish the structure, ultimately awarding the contract to Hoffman Construction, Inc., under the City's small works contract. (CP 9) Lakehaven Utility District, owns the water wells and controls the Sanitary Control Area nearby the demolition site.

The City; Now; PSCAA; and Lakehaven are all necessary parties for the proper adjudication of this cause and contemplated in the original caption with Hoffman, et al. The Superior Court Case Schedule Deadline for filing Confirmation of Joinder was 06/29/2011. The Summary Judgment Order was signed 06/10/2011. (CP 2)

Hoffman has had two known attorneys: John P. Ahlers, WSBA #13070 (former) and Mary Ann McConaughy, WSBA#8406 (current). The change

was by Notice of Substitution of Counsel to the Court, on 04 March 2011, which added The City of Federal Way as a defendant in the case caption thereby "vouchering-in" the City by their signatures; notice to the Court; and to Peter B. Beckwith, Assistant City Attorney for the City of Federal Way. (CP 6) The records of Mr. Ahlers provide ample evidence that the City was well aware of the process, (CP 11), and further that the City was aware by the Declaration of Mr. Beckwith filed with the Court. (CP 9)

Lakehaven Utility District by the Declaration of Stan French and the Second Declaration of Stan French by and for the Lakehaven Utility District, also added The City of Federal Way as a Defendant in its caption. (CP 10) & (CP 18). Both declarations were approved and certified by the Law Firm Stamp of Mary Ann McCounaghy's firm on 01 June 2011, thus "vouching-in" Lakehaven. The remaining necessary parties to be joined would have been NOW Environmental Services, Inc. and the Puget Sound Clean Air Agency.

Notwithstanding the original case caption and the joined parties, Hoffman undertook a nefarious scheme to isolate Hoffman as the sole defendant in these proceeding.

The PSCAA Regulation III, Section 4.02 (b); states "It shall be

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unlawful for any person to cause or allow any demolition unless the property owner or owner's agent obtains an asbestos survey by an AHERA building inspector of the structure to be demolished." The City was neither and the NOW survey was contracted by the City. The survey is not required to be forward to PSCAA along with the notification. The notification is required for all demolitions involving structures with a projected roof area greater than 120 square feet, even if no asbestos containing material is present. (PSCAA Regulation III, Section 4.03 Asbestos Notification Requirements: (a) (4)). The notification sent by the City provided the wrong address and described the structure as a single family, owner-occupied structure which was in error.(CP 14) Hoffman having been provided a copy of the asbestos survey and a Request for Quotes, signed a contract for the demolition. Said contract contained the wording describing the City as ("City" or "Owner"). (CP 9) It also contained at 8.2 City Indemnification. A hold harmless agreement including (including costs and attorney fees) without limitations to any and all persons or entities, arising from, resulting from, or connected with this contract "...to the extent solely caused by the negligent acts, errors, or omissions of the city, its employees or agents." (CP 9)

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Appellant Brief

The City erred in accepting the Asbestos Survey provided by NOW, certified by no less than three officials of the Corporation, which contained an expired Accreditation date of March 8, 2009. The demolition occurred on Dec. 14, 2009. (Refresher training is required by 40 CFR Appendix C to Subpart E of Part 763 Asbestos Model Accreditation Plans: At C-1 h. Accredited persons must have their initial and current accreditation certificates at the location where they are conducting work. And at C-2 we find the Refresher Course)

It is of note that there are two known accreditation certificates now in circulation. The second one having been made available to the Court by Declaration of Mary Ann McConaughy as Exhibit 4, on 05/10/2011.

It is without an Affidavit from NOW that it is a true and correct instrument. (CP 12) However Mr. Beckwith's Declaration of the same date contains the original NOW outdated Certificate for which the City contracted with full Affidavits. (CP 9) It appears as though there never was a fully certified asbestos survey performed, nor that a fully certified asbestos surveyor was ever on the property. The NOW survey does point

out the requirements and need to have a valid survey and the need to have an AHERA certified Inspector on site during the demolition if there are suspect asbestos-containing materials not found at the time of the survey. The NOW survey provided to the City the Parameters; Definitions; and Limitations and Inaccessible Areas, of its survey. (Exhibit 3) (CP 9)

The PSCAA Regulation III, Section 4.02 (b) Requirements for Demolitions. It shall be unlawful for any person to cause or allow any demolition unless the property owner or the owner's agent obtains an asbestos survey by an AHERA building inspector of the structure to be demolished. At (2) Only an AHERA building inspector may determine that a suspect material does not contain asbestos. (CP 14)

Garner is not an AHERA building inspector, and therefore accedes to the Federal Government and the PSCAA's regulations and definitions that suspect material historically contains asbestos and therefore if not determined otherwise by an AHERA building inspector, contains asbestos.

It is discernable that Hoffman did not have access to a correct Asbestos Survey when the demolition took place. PSCAA did not have a correct notification confirmed by Exhibit 5 of the Declaration of Mr. Beckwith. (CP 9)

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Appellant Brief

PSCAA had been notified by the City that there had not occurred a demolition in the City in Dec. 2009, however that conflicted with the notification timeline for the City's notification for the demolition at 803 SW 312th Street, Federal Way, WA., belonging to Garner. An inspector was dispatched to that address to find it standing, then searched the data base to find the correct address of 31616 6th Ave. SW, Federal Way, WA. belonging to Garner. An inspection there found evidence of a structure removal. (CP 14) Citations were issued to Garner and Hoffman. Garner's defense was that he was unaware that a demolition had occurred until he received the demand for payment of the demolition from the City. (CP 14)

Garner provided the City with notification of the address error where upon the City on 4 June 2010 contacted PSCAA and attempted to amend the Notification almost six months after the demolition had occurred. (CP 14) PSCAA Regulation III, Section 4.03 (b) (2) Amendments may not be used to add or change project site addresses listed on a previously submitted notification. (CP 14) The City's amended the address to 603 312th Ave. SW, which does not exist in Federal Way. (Exhibit O) (CP 14)

The City provided Garner, by an email from City Attorney Beckwith, a

copy of the original Notification to PSCAA with a hand written correction inscription of the correct address. (CP 14) This copy is not located in the files of the PSCAA.

The citation for Garner was closed without any actions. (CP 9) The City was issued a Warning Notice with the proviso that the City provide a correct notification address. The City provided another incorrect amended notification logged in at PSCAA on 6/4/2010 with the following errors: The demolition site is listed at the original wrong site of 803 SW 312th Street, Federal Way, WA.: Garner is listed as the property owner of that address which he was not; the Demolition contractor is listed as W.M. Dickson, Co. of 3815 South Pine Street, Tacoma, WA.; the start and completed date is for a prior year; and the site address is listed as a single family.(Exhibit H) (CP 14) Failing to ever get a proper notification, it appears that the PSCAA gave up, did not collect the money owed, and closed the file. The Warning Notice to the City was cancelled.

Hoffman Motioned the Trial Court for Summary Judgment and Award of Terms Under RCW 4.84.185 and Rule 11 simultaneously. (CP 8) The caption block indicated Hoffman Construction, Inc. as the sole Defendant, which is not in compliance with CR 10 (a) (1). The Motion

for Summary Judgment block contained two additional items:

(a) Award of terms under RCW 4.84.185, which reads in part. This determination "shall" be made upon motion by the prevailing party after a voluntary or involuntary order of dismissal, order on summary judgment, final judgment after trial or other final order terminating the action as to the prevailing party. (emphasis added) The Court transcript does not indicate a verbal motion in Court. (RP) The revised ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND FOR FEES AND COSTS, (CP 21), does not reflect a Motion being made after, but simultaneous with.

(b) CR 11, as referred to in the original Motion for Summary Judgment is inconsistent with the facts. The facts show that the complaint was not frivolous; was well founded in fact; and not interposed for any improper purpose; and were based on belief and statutory law.

The costs and attorneys' (sic)(plural) awarded by the Trial Court were not proper, to wit:

On 03/03/2011, Mr. John P. Ahlers, WSBA#13070, attorney for Hoffman in submitting his billing noted that a letter had been drafted to City demanding payment of fees and execute substitution. No charge for that transaction. Billing fee \$1,129. Page 3 of Declaration of Karen Hoffman (CP 11) Substitution of Counsel was filed on 03/04/2011. There should not be any other billing from Mr. Ahlers from that date forward relating to this case. (CP 6) Mr. Ahlers was cognizant of the contract between Hoffman and the City as shown in his payment demand from the City on that billing's last line. Note that Mr. Ahlers brought the City in as a Third Party to protect his interest. On page 4 of the Declaration of Karen Hoffman signed May 9, 2011, there appears to be a discrepancy. There is an entry for "total of new charges for this matter" - \$1,142.16 for a total of \$2,458.16 that appears by its heavier print to have been added.

This defect was questioned by Judge Benton as noted on page 31, lines 20-25. (TP)

There does not appear to be any record of whether Mr. Ahlers was paid by the City per his demand, or whether he had made arrangements with Mary Ann McConaughy to collect on his behalf. Nor does there appear to

be any record of whether Mary Ann McConaughy has been paid by the City as per the contract stipulations. There is in Mr. Ahlers's billing general statements as to the connections of the parties.

The PSCAA is generally concerned with air quality contaminants. Hence the regulations tend to lend themselves to what is airborne and inhaled or what was once airborne, then contaminated something by contact, which is then carried into a body. The PSCAA falls under the auspices of the Clean Air Act.

When the airborne contaminate comes into the potable water supply it falls under the Safe Drinking Water Act under the United States Environmental Protection Agency. That filters down to the Department of Health Services in Washington State which in turn relinquishes the Wellhead protection part of the Act to the local municipality. The Department of Health Services does exercise control of purveyors of water to require Wellhead protection areas to be mapped by time lines of source water aquifer recharge. The purveyors like Lakehaven are required to maintain Sanitary Control Areas around their well heads. WAC 246-290-135 at (d) The purveyor shall prohibit the construction, storage,

disposal, or application of any source of contamination within the SCA without the permission of the purveyor. Hoffman did not use due diligence and obtain that permission and proceeded with the demolition at its own risk.

The City issued its self a permit for the demolition (Exhibit D) (CP 14) Such a permit requires compliance with the Federal Way Revised Code (FWRC) Title 19, Chapter 185, Critical Aquifer Recharge Areas and Wellhead Protection Areas. However the Contractual language between the City and Hoffman at 1.5 Compliance with Laws. "Contractor shall perform the Work in accordance with all applicable federal, state and City laws, including but not limited to all City ordinances, resolutions, standards or policies .....and obtain all necessary permits and pay all permit, inspection, or other fees, at its sole cost and expense." (CP 9)

It was prudent for Mr. Ahlers and Mary Ann McCounaghy to add as a Third Party, the City, in defense of their client Hoffman.

The fact remains that Hoffman was contractually required to comply with all federal, state, and City laws and codes. It is evident that Hoffman did not do so.

WAC 246-290-72012 Regulated Contaminates, Which includes asbestos; lead; and arsenic, is used extensively by the Washington State Department of Ecology which has the statutory responsibility over the waters of the State by RCW 90.48.020. (CP 14)

RCW 70.103 Lead based Paint. Designates the Department of Commerce as the prime Agency for certification of Contractors in the State. Hoffman is not listed as being certified. Lead Based Paint was banned in 1978, the building was built and painted in the forties. The City does not address Lead based paint in the FWRC directly, but provides in 19.185.030 General Requirements

(1) Activities may only be permitted in a critical aquifer recharge area and wellhead protection area if the applicant can show that the proposed activity will not cause contaminants to enter the aquifer.

(2) The city shall impose development conditions to prevent degradation of the critical aquifer recharge and wellhead protection areas. All

conditions to permits shall be based on known, available, and reasonable methods of prevention, control and treatment (AKART).

(3) The proposed activity must comply with the water source protection requirements and recommendations of the Federal Environmental Protection Agency, State Department of Ecology, State Department of Health, and the King County health department.

Arsenic, commonly used as a cement fortifier when it was allowed, falls within the scope of the State Department of Ecology. There is no record that it was tested or that the Department was notified of the demolition.

All three contaminants fall within the area of concern of Lakehaven Utility District. It was therefore prudent for Lakehaven to also make the City a Third Party.

#### IV. Summary of Argument

There is very little argument as to what the rules and regulations are and state. Safety is provided by training, testing, retesting, and certifying all trades involved in the monitoring and handling of Regulated Contaminates. The regulations having originated at the Federal level are consistent at all State levels having been so approved. The regulations are

not designed to allow individual interpretation, so Washington State does provide guidance through its agencies. Failure to access that guidance can lead to contamination of our State.

#### V. Argument

There should be no argument that Hoffman Construction, Inc. broke a lot of rules. In fact it would be hard to find one that wasn't broken. When one deals with the Health, Safety, and Welfare of the populace, care must be taken. The Standard for Summary Judgment is well defined in:

Celotex Corp. v. Cattret, 447 U.S. 317, 324 (1986). Which provides a three step process. Hoffman Construction, Inc., the moving party, filed the Motion which included an Introduction and a Statement of Facts relating to events not connected to this Case. At Page 4 at line 21, C. This Case. Under case law, even though there are errors in this presentation, it satisfies the moving party's obligation and the non-moving party is required to respond. Plaintiff Garner responded with a point by point twenty one page document of factual knowledge.

The final obligation falls back on the moving party.

Under INTRODUCTION of Defendant's Reply Brief on its Motion for Summary Judgment and for Terms, Hoffman begins with, " Plaintiff begins his disjointed opposition brief rehashing his legal disputes with the City over the demolished structure which is the subject of this lawsuit. The City of Federal Way is not a party to this case." The Plaintiff's complaint for damages at IV Causes of Action states, "Defendant, has through and by its actions, caused asbestos and other toxins to be released into the air and onto the property so as to render an unsafe condition to humans and to the property thereto." Hoffman made the City of Federal Way a party to this case months earlier.

At 1. Plaintiff's Claims That Hoffman Contaminated the Site During Demolition are Unsupported in the Record. It then states, "Plaintiff's Complaint sets out his claims against Hoffman- the only matters Hoffman Construction need address in this motion. Hoffman then proceeds to try and make a statutory deficient asbestos survey viable, even though the City provides otherwise by providing a copy that it purchased. 40 CFR Appendix C to Subpart E of Part 763 Asbestos Model Accreditation Plan provides that it was deficient; the PSCAA deems it

deficient; and WAC 296-62 deems in deficient but Hoffman insists it was not deficient.

Hoffman, not an AHERA certified inspector, then determines what is and what is not asbestos. It would be prudent to allow the regulations to determine that. Other than that Defendant Hoffman does not deny any other assertions of Plaintiff Garner, but continues to make non-factual statements. Lakehaven has not violated Garner for any contamination of the Sanitary Control Zone. The only known trucks to have been on the property since 1990 have been subject to Hoffman control. Garner's old equipment has *not* been removed as stated, and therefore lacking notification that it is not a High Risk, this statement by Hoffman is lacking credibility. Actually in contrast to the statements made in this response, The Washington State Department of Commerce dictates the certification and training of people working with lead based paint because of its toxicity of airborne particles , and Lakehaven by its designation of Aquifer Recharge areas have deemed that the particles will reach the aquifer in six months after falling back onto the ground. As a reminder, Lakehaven controls the Sanitary Control Zone and any activities in that Zone are

required to be approved. Demolitions included.

Hoffman then reverts to trying to again validate the asbestos survey, instead of just reading the regulations.

"If the words of the statute are unambiguous, judicial inquiry should end, and the law interpreted according to the plain meaning of its words."

Rubin v. United States, 449 U.S. 424, 430, 101 S.Ct 698, 701 (1981).

Garner has been in the past a General Contractor, the equipment parked on site still to this day consists of an excavator, a bull dozer, and a mobile electrical generator. Garner was given every chance to do the demolition with that equipment, but refused primarily because of the extreme possibility, even knowing the regulations, that harmful contaminants might enter the air and drinking water, thereby causing harm to the populace.

Garner by a preponderance of documentations, and factual evidence, has proven beyond a shadow of doubt that there are there are material facts, when viewed in the light most favorable to the non-moving party, would cause the Summary Judgment to be awarded to the Plaintiff.

If brought before a jury of peers, the Complaint would most probably be awarded to Plaintiff.

#### VI. Conclusion

There are material issues of fact that could be proven at trial with factual evidence, with the inclusion of the necessary parties to be joined, that should preclude the Summary Judgment. However with all the facts presented, and those to be established further, it would lead to the Plaintiff filing for Summary Judgment prior to trial. To that extent Plaintiff request the present Summary Judgment be reversed and awarded to the Plaintiff, and the award of Attorney fees and cost be set aside.

4 November 2011

Respectfully submitted.

A handwritten signature in black ink, appearing to read "Charles R. Garner", written over a horizontal line.

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29.

Appellant Brief

CERTIFICATE OF SERVICE

I certify under penalty of perjury that I have caused to be sent by U. S. Mail, postage prepaid, to the following:

Mary Ann McConaughy

Keating, Bucklin & McCormack, Inc. P.S.

800 Fifth Avenue, Suite 4141

Seattle, WA. 90104-3175

Item included is: Appellant's Opening Brief

Done this 7th Day of November 2011

A handwritten signature in black ink, appearing to read "Charles R. Garner", written over a horizontal line.

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